IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Petitioners,

v.

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR H. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Co., Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the First Circuit, officially reported at 555 F.2d 3, are annexed to this petition as Appendix A. (A. 1a.)* The opinion of the United States District Court for the District of Rhode Island, which dismissed plaintiffs' antitrust claim, is not officially reported, but is annexed as Appendix B.** (A. 26a.)

Jurisdiction

The Court of Appeals entered judgment on May 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). A judgment of the District Court dismissing the Amended Complaint was entered on December 1, 1975, and a final judgment dismissing the Second Amended Complaint was entered on April 1, 1976. Jurisdiction in the District Court was asserted under 15 U.S.C. §§15 and 26, and 28 U.S.C. §§1331 and 1337.

Questions Presented

The McCarran-Ferguson Act expressly renders the Sherman Act inapplicable to the business of insurance to the extent regulated by the states, except in cases involving "boycott, coercion or intimidation." Here, the First Circuit adopted an interpretation of the boycott exception which, in the words of the dissenting opinion, would "reintroduce through the back door most of the Sherman Act" (A. 24a), and which the majority opinion acknowledged to be in direct conflict with a "formidable array of authorities." (A. 6a.)

* Citations refer to the Appendix found at the conclusion of this Petition.

** In a second opinion, entered on March 19, 1976, the District Court dismissed plaintiffs' state law claims. That opinion was affirmed by the Court of Appeals for the First Circuit and is not a subject of this petition.

In a 2 to 1 decision, the First Circuit rejected the then unanimous view that the boycott exception did not encompass claims by policyholders based upon alleged conspiracies among insurance companies relating to the terms of their insurance contracts. The First Circuit held that policyholders could overcome the McCarran-Ferguson antitrust exemption and bring their claims within the boycott exception by simply pleading them as a concerted refusal to sell policyholders the type of coverage they wanted.

All other courts which have considered the issue have reasoned that such a reading would bring virtually every Sherman Act conspiracy claim concerning the terms of insurance policies within the boycott exception. This, they concluded, would nullify the McCarran-Ferguson antitrust exemption and undermine this Court's stated view that the Act was primarily designed "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969). Hence, these courts limited the exception to the boycotts and blacklists of other insurance companies and agents which were Congress' main concern at the time it enacted the exception, or to similar conduct involving concerted action

to coerce other traders to adhere to the terms of the conspiracy.

As the dissent points out, the novel First Circuit reinterpretation of the boycott exception "introduces a new category of federal antitrust suit" which "could have unforeseeable effects upon state regulatory policies." (A. 25a.) It would enable policyholders to convert grievances concerning the terms of their insurance policies into federal antitrust claims and, for the first time since the enactment of the McCarran-Ferguson exemption more than 30 years ago, it would thrust upon the federal courts a consumer protection role heretofore exercised exclusively by state insurance departments.

This petition thus presents the following questions for review:

1. Should the First Circuit's novel and broad interpretation of the boycott exception to the McCarran-Ferguson Act antitrust exemption be allowed to prevail in the face of its admitted conflict with "a formidable array of authorities," including at least two different but narrower constructions of the boycott exception adopted by four other circuit courts of appeals?

2. Did the First Circuit erroneously permit the boycott exception to the McCarran-Ferguson Act antitrust exemption to be invoked by policyholders who simply pleaded an alleged conspiracy by insurance companies to limit the type of coverage available as a concerted refusal to sell policyholders the coverage they want?

3. By greatly expanding federal jurisdiction to hear complaints by policyholders concerning the terms of their insurance, does the First Circuit's interpretation of the boycott exception conflict with *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459-60 (1969), which found that the purpose of the McCarran-Ferguson Act was to leave to state regulation matters involving "the relationship between the insurance company and the policyholder"?

4. Was the First Circuit's novel and broad interpretation of the boycott exception to the McCarran-Ferguson Act antitrust exemption warranted in light of the meaning commonly given to the term "boycott" by this Court in cases arising under the Sherman Act?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 (Supp. V, 1975):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. §1011 (1970):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. §1012 (1970):

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate the the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the . . . Sherman Act, and the . . . Clayton Act, and . . . the Federal Trade Commision Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §1013(b) (1970):

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Statement of the Case

1. The Antitrust Allegations

Plaintiffs purport to represent a class of Rhode Island physicians and a class of their present or prospective patients. The first count of their amended complaint (Appendix C, A. 38a)* was brought under the Sherman Act and alleged a conspiracy among St. Paul, by whom the plaintiff physicians had been insured for malpractice, and Aetna, Hartford and Travelers.

According to the complaint, in April, 1975, St. Paul announced that it would not renew medical malpractice coverage on an "occurrence" basis and would issue new coverage only on a "claims made" basis.** Plaintiffs allege that thereafter Aetna, Hartford and Travelers refused to issue any malpractice coverage to physicians previously covered by St. Paul, as part of a collective refusal by the insurance companies to sell medical malpractice coverage on an "occurrence" basis to physicians insured by St. Paul. (A. 46a-48a.)

The complaint also describes the alleged conspiracy as an agreement not to compete, price-fixing and unfair discrimination between insureds, and contains the customary

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* Plaintiffs' first amended complaint is set forth in its entirety in Appendix C. A subsequently dismissed second amended complaint, setting forth plaintiffs' state law claims, is not a subject of this petition and is not annexed.

** An "occurrence" basis policy covers claims arising out of acts occurring during the term of the policy even when the claim is made after the policy expires. "Claims made" policies cover only claims actually asserted while the policy is in force, thus precluding liability for potential claims after the policy expires.

recitation in cases of this kind, that such conduct amounted to boycott, coercion and intimidation. (A. 48a.)

Plaintiffs seek damages and equitable relief, including an injunction prohibiting the insurance companies from denying plaintiffs "medical malpractice insurance on an 'occurrence basis' at reasonable rates. . . ." (A. 51a.)

2. The Decisions Below

The District Court granted a motion to dismiss these antitrust allegations, holding that they were barred by the McCarran-Ferguson exemption. There was no dispute that the conduct alleged related to the "business of insurance". Nor was there any question that the conduct was regulated by Rhode Island. Aside from a comprehensive code regulating all phases of the insurance business, including anti-competitive and unfair practices, Rhode Island was then trying to remedy problems in the cost and availability of medical malpractice insurance through special emergency regulation. Commencement of this suit virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ("JUA"), which took over the business of writing medical malpractice coverage in Rhode Island with full authority to establish terms and rates for such coverage.*

* The JUA was created by Emergency Regulation XXI, R.I. Dep't of Business Regulation, Insurance Division, June 16, 1975, and received express legislative sanction in R.I. Gen. Laws §42-14.1-1. Rhode Island's comprehensive regulation of the business of insurance in general is illustrated by R.I. Gen. Laws §§27-9-4, 27-9-7, 27-9-15, 27-9-16, 27-9-18, and 27-9-19, setting forth requirements and procedures for state approval of the terms of insurance policies, and by R.I. Gen. Laws §§27-29-1 *et seq.*, broadly prohibiting "unfair competition and practices" in the "business of insurance."

Plaintiffs argued, however, that the McCarran-Ferguson exemption did not preclude them from seeking simultaneous relief in the federal courts because, they contended, the conduct alleged came within the boycott exception. The District Court rejected this argument, relying on the Fifth Circuit's decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), and the Ninth Circuit's decision in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). The District Court adopted the reasoning of these Courts of Appeals that to read the exception to encompass policy holder claims "would be contrary to the legislative history of the Act," would "emasculate" the Act, and " 'would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship.' " (A. 32a.) By the time the appeal from the District Court reached the First Circuit, at least six additional District Courts had adopted the Fifth and Ninth Circuit construction of the boycott exception.

The First Circuit concluded that it was "compelled to disagree with this rather formidable array of authorities." (A. 6a.) Over the dissent of Judge Campbell, the majority concluded that, notwithstanding these decisions, the boycott exception must be read to encompass claims by policyholders that insurance companies engaged in a concerted refusal to sell them the type of policies they desired.

The majority believed that the prior decisions were in error for two reasons: First, the Court concluded that the earlier decisions erroneously went behind the words

of the boycott exception and relied upon its legislative history. In the majority's view, the "plain meaning" of the phrase "boycott, coercion and intimitation" encompassed claims by policyholders that insurance companies collectively refused to sell them the insurance they wanted. The majority rejected the view that such a reading of the exception would nullify the McCarran-Ferguson exemption from the Sherman Act. Yet the majority appeared to acknowledge that under its reading the only claims that would continue to be exempt from the Sherman Act were acts of individual monopolists, such as predatory pricing and the use of "benign" means to maintain a monopoly. (A. 9a.)

Second, the majority concluded that the prior decisions had misread the legislative history of the boycott exception when they found that Congress was solely concerned with a system of industry self-government, which enforced its regulations of those engaged in the insurance business through boycotts and blacklists of nonconforming insurance companies and agents. While conceding that the legislative history made no mention of boycotts, coercion or intimidation aimed at consumers, and that the history disclosed that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil," the majority concluded that "there is no suggestion that the legislation was limited to that evil." (A. 17a.)

Judge Campbell entered a vigorous dissent. In his view, the majority's interpretation of the exception ren-

dered virtually meaningless the McCarran-Ferguson exemption from the Sherman Act:

> "[U]nder the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the §1013(b) exception permits. That exception provides, 'Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.' Significantly this language does not track the broad 'contract, combination . . . or conspiracy' language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> ". . . Indeed to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act." (A. 22a-24a.)

Moreover, Judge Campbell viewed the majority decision as subversive of the main objective of the McCarran-Ferguson Act:

> "The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policy holders—is left to the states. The present

litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purpose of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act." (A. 24a-25a.)

Finally, Judge Campbell's dissent noted with concern the radical change which the majority's novel interpretation effected in the role of the federal courts and in its potential impact on state regulation of insurance:

"This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment." (A. 25a.)

Reasons for Allowance of the Writ

We believe certiorari is warranted not only because the First Circuit's interpretation of the boycott exception creates a conflict with other circuits. Review is needed because the First Circuit's interpretation seriously undermines the McCarran-Ferguson exemption from the Sherman Act, subverts the purposes attributed to the McCarran-Ferguson Act in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), and radically alters federal-state relations in the regulation of the policyholder-insurance company relationship by opening the federal courts to a new type of consumer protection suit in an area previously considered within the exclusive jurisdiction of the states. In this very case, the continuation of this lawsuit would bring the federal court into a controversy which the State of Rhode Island has already addressed through emergency regulatory measures. As Judge Campbell noted, "the potential for conflict between state regulation and federal antitrust policies is real. . . ." (A. 25a.) Review by this Court is needed to effectuate the McCarran-Ferguson Act's policy of preventing such conflicts.

I. An authoritative resolution by this Court is required to resolve a three-way conflict dividing the various circuits on the meaning of the boycott exception to the McCarran-Ferguson Act.

The First Circuit acknowledged that it was in conflict with a "formidable array of authorities." Indeed, the conflict has now been expanded, since a recent decision by the Court of Appeals for the District of Columbia Circuit has adopted yet a third interpretation of the exception

which also conflicts with the First Circuit's. The construction of the boycott exception has been a frequent source of litigation in the last few years—since 1974, there have been at least 10 federal court decisions in which the meaning of the exception was in issue—and it is, at this moment, a central issue in numerous cases pending in the federal district and appellate courts.* An authoritative resolution of the conflict is thus urgently needed.

Meicler v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), *aff'g* 372 F. Supp. 509 (S.D. Tex. 1974), which involved facts very similar to those involved here, is representative of the view adopted by a majority of courts which have considered the scope of the boycott exception.

In *Meicler*, plaintiffs complained that the insurance company with which they had been doing business refused to renew an automobile liability policy on terms which they thought reasonable, and that all other insurers within the state conspired with that company to refuse to sell policies to them on their former, more advantageous terms. The allegations were thus a precise analogue to those presented here. In an effort to bring their claim within the boycott exception, plaintiffs framed their allegations in terms of

* We are aware of the following pending cases in which the construction of the exception for boycotts, coercion or intimidation is in issue: *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Texas 1976), *appeal docketed*, No. 76-2746 (5th Cir. June 24, 1976); *Goldman* v. *Aetna Life Insurance Co.*, No. CA-4-77-154 (N.D. Texas, filed June 6, 1977); *Bartholomew* v. *Virginia Chiropractors Association*, No. 77-0062-R (W.D. Va., filed April 7, 1977); *Manhattan Life Insurance Co.* v. *Prudential Insurance Co. of America*, No. 70-837-G (D. Mass., filed June 30, 1970). In addition, another petition for certiorari (No. 77-171), filed with this Court on July 29, 1977, seeks review of the interpretation of the boycott exception adopted by the Third Circuit in *Frankford Hospital* v. *Blue Cross*, 554 F.2d 1253 (3d Cir. 1977), *aff'g* 417 F.Supp. 1104 (E.D. Pa. 1976).

a collective refusal to deal, except on terms which the insurance companies dictated. The District Court rejected the attempt. In its view, the legislative history of the boycott exception revealed that Congress was primarily seeking to deal with conspiracies among insurance companies to boycott or refuse to deal with other insurance companies and agents. It found nothing to suggest that the boycott exception was intended to apply to "a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates." 372 F. Supp. at 513-14.

On appeal, the Fifth Circuit unanimously affirmed, stating that:

> "[plaintiffs'] broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act. We affirm the district court's holding that the boycott exception does not apply." 506 F.2d at 734.

The Fifth Circuit view has also been adopted by the Ninth Circuit in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1974), and it now appears that the Third Circuit implicitly adopted this construction in its *per curiam* affirmance in *Frankford Hospital* v. *Blue Cross*, 417 F.Supp. 1104 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir. 1977), *petition for cert. filed*, No. 77-171 (U.S. July 29, 1977). Nine District Court decisions have adopted the same construction.*

* *Pierucci* v. *Continental Casualty Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (involving an attack on "claims made" policies similar to the one involved here); *State of Ohio* v. *Ohio Medical Indemnity*,

(footnote continued on next page)

Recently, the Court of Appeals for the District of Columbia adopted yet another narrower construction of the boycott exception in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cases (CCH) ¶61,481 (D.C. Cir. 1977). *Proctor* did not involve a suit by a policyholder, but by tradesmen in the auto repair business who claimed that insurance companies conspired with other auto repairmen to limit payments for auto repairs under automobile insurance contracts. Plaintiffs claimed that the effect of this conspiracy was to limit the prices they could charge for auto repairs. A principal issue in *Proctor* was whether the auto repairmen's claim that the conspiracy involved a collective refusal to deal except at fixed terms fell within the boycott exception.

The Court of Appeals was unwilling to accept the Fifth and Ninth Circuit view that the boycott exception was limited to boycotts of other insurance companies and their agents. However, unlike the First Circuit here, the District of Columbia Circuit "recognize[d] that the terms of the [boycott] provision are not self-defining, and are capable of being read in such a way as to swallow the anti-trust ex-

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Inc., 1976-2 Trade Cases (CCH) ¶61,128 (S.D. Ohio 1976); *Mathis* v. *Automobile Club Inter-Insurance Exchange*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976), *appeal docketed*, No. 76-2746 (5th Cir. June 24, 1976); *Pastor* v. *Hartford Fire Insurance Co.*, 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), *appeal docketed*, No. 77-1243 (9th Cir. January 26, 1977); *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Seasongood* v. *K&K Insurance Agency*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mitgang* v. *Western Title Insurance Co.*, 1974-2 CCH Trade Cases ¶75,322 (N.D. Cal. 1974); and *Transnational Insurance Company* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

emption." (1977-1 Trade Cases (CCH) at 71,869.) It recognized, for example, that a price-fixing conspiracy could "perhaps be characterized as a collective refusal to deal except at the prevailing rates." (1977-1 Trade Cases (CCH) at 71,870.) However, it found that the boycott exception could not possibly be read so expansively because the legislative history clearly indicated that price-fixing was not considered a boycott, and that such conduct fell squarely within the McCarran-Ferguson exemption. (1977-1 Trade Cases (CCH) at 71,869.)

The Court found instead that interpreting the language of the exception in light of the legislative purpose permitted alleged conspiracies to be brought within the boycott exception only where the conspirators took distinct punitive steps to compel adherence to the terms fixed by the conspiracy, such as excluding from the market those who would not be bound by its terms.

Proctor is flatly inconsistent with the result reached by the First Circuit. Under *Proctor*, traders other than insurance companies or agents may invoke the boycott exception. But *Proctor* does not allow policyholders dissatisfied with the terms of their insurance contracts to open the doors of the federal courts simply by framing their complaint in the language of a concerted refusal to sell them the type of policies they desire.

The First Circuit's interpretation of the boycott exception—which considers such policyholder claims to be within the scope of the exception—is thus at odds not only with the majority view, but also with the more recent *Proctor*

test.* Review by this Court is urgently needed to provide definitive guidance as to the proper interpretation of the exception.

II. Review is needed to correct a misinterpretation of the boycott exception which would subvert the McCarran-Ferguson exemption and involve federal courts in a new class of consumer litigation involving controversies which Congress left to the states to resolve.

Every federal judge who has considered the issue—except the First Circuit majority—has concluded that an expansive reading of the boycott exception, to encompass claims like those involved here, would emasculate the express Sherman Act exemption conferred by Congress in the McCarran-Ferguson Act and undermine the congressional policy that regulation of the insurer-insured relationship should be left to the states. Hence, these judges

* *Proctor* suggests that the Second, Third and Fourth Circuits adopted broader definitions of the boycott exception, varying from the Fifth and Ninth Circuit tests. However, the Second Circuit case it cites—as the *Proctor* Court acknowledges—involved allegations of a boycott directed at other insurance companies. *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). The Third Circuit case, *Travelers Insurance Co.* v. *Blue Cross*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973), merely held that there was no boycott of any kind. In the later *Frankford* case, the Third Circuit affirmed a decision which relied on the cases limiting the exception to boycotts directed at other insurance companies and agents. *Frankford Hospital* v. *Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd* 554 F.2d 1253 (3d Cir. 1977), *petition for cert. fued*, No. 77-171 (U.S. July 29, 1977). And the Fourth Circuit case cited by the First Circuit in support of its decision, *Ballard* v. *Blue Shield*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (U.S. March 8, 1977), which did allow traders other than insurance companies and agents to invoke the boycott exception, apparently did not consider the insurance company-agent limitation, which is not discussed in its opinion and was only briefly referred to in one of the six briefs on appeal.

have looked to the history and background of the Act to find a limiting construction which would harmonize the boycott exception with the broad objectives of the McCarran-Ferguson Act.

We believe this view is unquestionably correct, and that review is needed to implement the congressional policy reflected in the Act and assure that the First Circuit's interpretation does not become an invitation to policyholders to invoke a federal forum to redress grievances which until now have been left to state regulation.

A. The First Circuit's interpretation nullifies the McCarran-Ferguson Act exemption from the Sherman Act and frustrates its policy to leave to state regulation matters involving the relationship between insurance companies and policyholders.

The background and objectives of the McCarran-Ferguson exemption were explained by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-60 (1969):

> "The McCarran-Ferguson Act was passed in reaction to the Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '[i]ssuing a policy of insurance is not a transaction of commerce.' *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. . . ."

". . . In context . . . it is relatively clear what problems Congress was dealing with. Under the regime of *Paul* v. *Virginia, supra,* States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. . . ."

". . . Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' "

There can be no question that the central purpose of the McCarran-Ferguson Act was to render federal law—and specifically the Sherman Act and other antitrust laws—inapplicable to matters affecting the insurer-insured relationship where those matters are regulated by state law. Indeed, so significant was this policy that Congress declared a three year moratorium on the application of the antitrust laws to give the states time to enact regulatory legislation which would have a reverse preemptive effect on federal antitrust laws. 15 U.S.C. §1012(b).

The First Circuit's interpretation stands the McCarran-Ferguson Act on its head. By reading the boycott exception as indicative of an expansive antitrust policy, rather than

looking to the policy of the Act as a whole, the First Circuit confines the express McCarran-Ferguson exemption from the Sherman Act to conduct by individual monopolists primarily aimed at excluding their competitors, and allows application of the Sherman Act to precisely that area which Congress left to the states—complaints by policyholders against insurance companies concerning the terms of their insurance coverage. Thus, the First Circuit's interpretation brings every alleged conspiracy or agreement covered by the Sherman Act within the boycott exception: Price-fixing allegations, for example, can be couched as conspiracies to refuse to sell coverage except at the agreed rate; horizontal agreements not to compete can be transformed into concerted refusals to deal with one another's customers; agreements not to engage in product competition can be framed as collective refusals to sell other than the agreed upon product. Indeed, the conduct alleged here as a concerted refusal to deal could as easily have been described under other antitrust classifications not normally thought of as boycotts: an agreement by the insurance companies to fix the type of malpractice coverage available; an agreement not to engage in product competition; or an agreement not to compete for customers. And, under an expansive reading, any alleged agreement to restrain trade which could not be described as a concerted refusal to deal could surely fit within the rubric of coercion and intimidation.

By reintroducing the full force of the Sherman Act to the area of policyholder-insurance company relations, the First Circuit's interpretation poses the very threat to state regulation which the McCarran-Ferguson Act was designed to eliminate. This case dramatizes the point.

The timing of this lawsuit coincided with the implementation of Rhode Island's regulatory efforts to deal with problems of the cost and availability of medical malpractice coverage. Plaintiffs seek a federal court decree requiring the issuance of "occurrence basis" policies at "reasonable rates." But under Rhode Island's regulatory scheme, the JUA is authorized to issue either "claims made" or "occurrence basis" policies, or both, and to fix the rates for such coverage.* Plaintiffs also seek damages based upon alleged overcharges in malpractice premiums, which would amount to a rebate from the rates approved by Rhode Island.

More important, the First Circuit's expansive interpretation of the boycott exception may encourage policyholders to use the bludgeon of onerous federal antitrust class action litigation as a device for obtaining solutions to problems heretofore left to state insurance regulatory agencies. Many antitrust class actions are commenced principally, if not entirely, in the hope of obtaining a monetary settlement or compelling agreement among the parties to a change in business practices. But private settlement of controversies involving the terms of insurance contracts issued to an entire class of policyholders, even with court approval, runs counter to a system of state regulation of the terms and rates of insurance contracts.

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* Emergency Regulation XXI §5, R.I. Dep't of Business Regulation, Insurance Division; R.I. General Laws §42-14.1-1(F).

B. The First Circuit's construction of the boycott exception should not be allowed to prevail over the narrow constructions adopted by other circuits or the common meaning of the term "boycott" as used by this Court in cases arising under the Sherman Act.

Nothing warranted the First Circuit in giving to the boycott exception a broad interpretation which so emasculates the McCarran-Ferguson exemption and subverts its policy. In applying what it believed to be the "plain meaning" of the words of the exception, the First Circuit ignored this Court's warning that "[t]he process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945). The narrower constructions given to the boycott exception by the Third, Fifth, Ninth and District of Columbia Circuits are necessary to preserve the exemption and carry out its policy.

Moreover, the "plain meaning" of the phrase "boycott, coercion or intimidation" does not encompass claims by policyholders like those involved here. Alleged agreements among sellers not to compete for one another's customers or to fix the terms on which they are willing to deal have never been classified by this Court as boycotts under the Sherman Act—and restating such agreements as concerted refusals to deal except on the terms fixed by the conspiracy cannot make them boycotts. Every boycott case decided by this Court has involved collective action to prevent a trader outside of a conspiracy from competing with one or more of the conspirators, or to force a competitor not part of a conspiracy to conform his business practices to

those which the conspiracy dictates. *E.g. United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944); *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941). No case has ever treated the type of concerted refusal alleged here as a boycott.

Further, this Court has recognized that "words" used in statutes "acquire scope and function from the history of events which they summarize." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 186 (1941). The words "boycott, coercion or intimidation" appear to have been taken from *United States* v. *South-Eastern Underwriters,* where they were used to summarize collective action taken by insurance companies and agents to compel other insurance companies and agents to adhere to a system of private regulation, and to exclude from the market those who would not conform.* This Court did not refer, by that phrase, to simple agreements to fix the price of insurance sold to consumers.

The conduct described in *United States* v. *South-Eastern Underwriters* was the same conduct which Congress referred to in its discussions of the boycott exception, as even the portions of legislative debate quoted by the First Circuit majority makes plain. (A. 13a-16a.) Indeed, the

* The First Circuit understood *United States* v. *South-Eastern Underwriters* to include "boycotts" of policyholders. But this Court's reference to such practices related to refusals to deal with policyholders who dealt with non-member insurance companies, and with companies varying from the terms of the conspiracy, and was part of the overall effort to exclude non-participating companies or agents from the insurance business. *See* 322 U.S. at 535-36, 562.

boycotts and blacklists of insurance companies and agents, and the private system of self-government to enforce adherence to the industry's rules, are the only illustration found in the debates of what Congress meant by "boycott, coercion or intimidation." "[A]t no point," as the First Circuit majority recognized, "were any remarks directed to the possibility of boycotts, coercion or intimidation aimed at consumers." (A. 16a.)

The Fifth and Ninth Circuits found the legislators' concern, as expressed in the debates, sufficient to justify restriction of the boycott exception to acts against insurance companies and agents. The District of Columbia Circuit in *Proctor,* not convinced that Congress intended to limit the Act to boycotts directed at insurance companies and agents, looked to the text of *United States* v. *South-Eastern Underwriters* to ascertain the type of conduct there described by the phrase "boycott, coercion or intimidation." But like the Fifth and Ninth Circuits, the District of Columbia Circuit recognized the need for some limitation which would preclude suits, like the one involved here, in which policyholders seek to cast their grievances pertaining to the terms of their insurance contracts as a collective refusal to sell them coverage on terms they desire.

Without such a limiting principle, for which the history underlying the McCarran-Ferguson Act and this Court's use of the term "boycott" furnish ample support, no meaningful exemption would remain.

Conclusion

The First Circuit's departure from the more limited interpretations of the boycott exception, now adopted by four other circuits, expands federal jurisdiction into a realm historically left to the states, giving every policyholder a federal forum in which to air grievances previously thought the domain of state administrative, legislative and judicial processes.

Such a change in federal-state relations, involving a significant expansion of federal judicial power, and commitment of federal judicial resources, should not be permitted without review by this Court.

August, 1977

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Appendices

Appendix A

Opinion of the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1226

DAVID M. BARRY, M.D., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

ST. PAUL FIRE &
MARINE INSURANCE COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*, and
GIGNOUX,* *District Judge*.

Leonard Decof, with whom *Mark S. Mandell* and *Leonard Decof, Ltd.* were on brief, for appellants.

Sidney S. Rosdeitcher, with whom *Paul, Weiss, Rifkind, Wharton & Garrison, Jack Hassid, Hinckley, Allen, Salisbury & Parsons, Thomas D. Gidley, Stephen J. Carlotti, Covington & Burling, Charles Lister, Jonathan M. Weisgall, Carroll, Kelly & Murphy*, and *Joseph A. Kelly* were on brief, for Aetna Casualty & Surety Co., Hartford Casualty Company and Hartford Fire Insurance Company, appellees.

Walker B. Comegys, with whom *Powers & Hall, Kirk Hanson, David P. Whitman, Hanson, Curran, Bowen & Parks, Joseph V. Cavanagh*, and *Higgins, Cavanagh & Cooney* were on brief, for St. Paul Fire & Marine Insurance Company and Travelers Insurance Company, appellees.

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* Of the District of Maine, sitting by designation.

Appendix A

May 16, 1977

COFFIN, *Chief Judge.* The primary issue presented by this appeal is whether a "consumer" of insurance can sue an insurance company for violating the antitrust laws. Under the McCarran-Ferguson Act, 15 U.S.C. §§1011-15, "the business of insurance" is exempted from antitrust regulation to the extent that it is regulated by the states. *Id.* §1012(b). But McCarran-Ferguson does not confer a blanket immunity: insurers are subject to the Sherman Act if they engage in "acts of boycott, coercion, or intimidation" or if they agree to engage in such acts. *Id.* §1013(b). We must decide whether this exception applies only to insurance company boycotts of agents and other companies or also applies to refusals to deal with policyholders.

This suit is brought by plaintiffs seeking to represent two classes: all licensed physicians practicing in the state of Rhode Island and all citizens of Rhode Island who are or will be under a doctor's care. The defendants are four insurance companies that have sold malpractice insurance to Rhode Island doctors. The plaintiffs charges in their amended complaint that these companies violated the nation's antitrust laws by conspiring to shrink the malpractice coverage available to Rhode Island doctors. According to the complaint, one company, St. Paul Fire & Marine Insurance Company, changed its future malpractice policies to provide coverage only on a "claims made" basis, rather than an "occurrence"

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basis.[1] When St. Paul's disgruntled customers tried to take their business elsewhere, the other insurance companies refused to sell them malpractice policies of any sort. Believing this to be the result of an unlawful conspiracy in restraint of trade, plaintiffs sought injunctive relief and treble damages.[2] The viability of their suit depends on the scope of the McCarran-Ferguson Act. 15 U.S.C. §1011-15.

The Act must be placed in historical context if it is to be understood. For many years, from 1869 to 1944, the Supreme Court steadfastly maintained that insurance was not "commerce" and that state regulation of insurance did not impinge on the federal government's power to regulate interstate commerce. *See, e.g., Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869). In 1944, however, the Supreme Court repudiated the principle that insurance is not commerce and held that federal antitrust laws could constitutionally be applied to insurance companies. *United States* v. *South-Eastern Underwriters Ass'n,* 322

1. An "occurrence" policy protects the holder from liability for any act done while the policy is in effect; a "claims made" policy, in contrast, protects the holder only against claims made during the policy's life. Thus a doctor who practiced for only one year, say 1972, would need only one 1972 "occurrence" policy to be fully covered, but he would need several years of "claims made" policies to protect himself from claims arising out of his acts in 1972.

2. At our request, both sides briefed the question of whether the plaintiffs' antitrust claim was mooted when the state of Rhode Island formed a joint underwriting association to provide malpractice insurance. Because of the state's action, St. Paul never gathered the fruits of the alleged conspiracy. Nonetheless, we are convinced that, for purposes of our jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief. *United States* v. *Concentrated Phosphate Export Ass'n, Inc.,* 393 U. S. 199, 203-04 (1968). We do not decide whether plaintiffs were in fact "injured in [their] business or property". 15 U.S.C. §15. *Cf.* n.7 *infra.* Nor do we decide whether this would be an appropriate case for injunctive relief.

U.S. 533 (1944). This decision left the nation's insurance companies and the states' regulatory bodies dumbfounded; suddenly, state taxation and regulation of insurance seemed open to serious constitutional doubts. Federal authorities were loath to assume the burden of substituting national for state supervision of insurance.

To restore some certainty, Congress passed the McCarran-Ferguson Act in 1945. The Act made it clear that state regulation and taxation of insurance could continue. It also narrowed the impact of federal law on the insurance business, stating that "the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012(b). This provision allows the states to engage in a kind of "reverse preemption", and the states were quick to enact the necessary laws.

The parties agree that the defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business. *Cf. SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969); *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). The controversy in this case centers on an exception to the "preemptive" powers of the states: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. §1013(b).

The district court concluded that "despite this provision's board wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case." It held

that the "boycott, coercion, and intimidation" exception was intended by Congress solely to protect insurance agents or other insurance companies from being blacklisted by combinations of companies, and was not intended to have any bearing on the insurer-insured relationship. It also observed that a contrary holding would vitiate the McCarran-Ferguson Act by, presumably, cutting deeply into the area of regulation which has been given to the states. In so holding, it relied on the only case authorities which had dealt with this issue. *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Meicler* v. *Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975); *Transnational Ins. Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

Six other district courts have now taken the same view. *Mathis* v. *Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27 (D. D.C. 1975); *McIlhenny* v. *American Tit. Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Royal Drug Co.* v. *Group Life and Health Ins. Co.*, 415 F. Supp. 343 (W.D. Tex. 1976); *Seasongood* v. *K & K Ins. Ag'cy*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, —— F.2d —— (8th Cir. Jan. 6, 1977); *Frankford Hosp.* v. *Blue Cross*, 1976-2 Trade Cas. ¶61,030 (E.D. Pa. 1976).[3]

3. In attacking the district court's decision, appellants cite an additional case from the Fifth Circuit. *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). Although appellees correctly point out that *Battle* is distinguishable and that it was decided before *Meicler, supra*, the *Battle* court did show a willingness to give the boycott provision a straightforward reading, an attitude that we share. *See also Ballard* v. *Blue Shield*, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (Mar. 8, 1977).

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Since we feel compelled to disagree with this rather formidable array of authorities, we first try to summarize as fairly as we can the bases for their decision. We then make our own analysis of the wording of the statute and its legislative history. The line of cases begins with *Transnational Ins. Co.* v. *Rosenlund, supra.* Although the *Transnational* court found that it was not faced with a boycott even within the ordinary meaning of that word, it announced in passing that the boycott provision

> "was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list,' which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed companies; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies." 261 F. Supp. at 26-27 [footnote omitted].

Only blacklisting by an insurance company, the court intimated, was subject to the Sherman Act under this provision. The court, though referring broadly to "the legislative history", cited only a single page of the Congressional record in support of this reading. 91 Cong. Rec. 1087 (1945). *Transnational* stood alone until 1974, when the Fifth and Ninth Circuits followed its lead. The courts of appeals simply adopted without elaboration the *Transnational* court's discussion of "the" legislative history. One reason for taking so narrow a view of the provision was the courts' apparent fear that any other reading would "emasculate", *Meicler, supra,* 506 F.2d at 734, or "vitiate",

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Addrisi, supra, 503 F.2d at 729, the McCarran-Ferguson Act. To fend off this danger, the *Meicler* court adopted a rule that policyholders or members of the public could not seek the benefit of the boycott provision. Later cases have followed these pioneers without adding to their analysis.

As will be seen, we disagree with the conclusion reached by these courts. Simple disagreement might not be enough if the insurance business had long relied on authoritative rulings in other circuits. That is not the case here. The view we reject was not advanced until 1966, when a single district court suggested it. Only in the past three years has its narrow reading of the boycott provision begun to gain more general favor. What prevents us from following the trail blazed by the *Transnational* court is its decision to go behind the statutory language. We would be justified in probing legislative history if the language were ambiguous or if, even though unambiguous, the language literally read produced a senseless or unworkable statute. *Massachusetts Financial Serv., Inc.* v. *Securities Investor Protection Corp.,* 545 F.2d 754 (1st Cir. 1976). *Cf. United States* v. *Slater,* —— F.2d —— (1st Cir. Dec. 22, 1976).

The words "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation", within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a "concerted refusal to deal" with a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).[4]

4. Most cases have dealt with boycotts directed against retailers or other links in the chain of production and distribution. *E.g., Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941); *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.,*

(footnote continued on next page)

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Concerted refusals by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language.

The articulated justification is based on the supposed "vitiation" of the McCarran-Ferguson Act if the boycott provision were to be given its normal Sherman Act scope. We observe first that a license to construe statutory words narrowly to avoid defeating legislative purpose is not to be cavalierly exercised. Under the McCarran-Ferguson Act,

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364 U.S. 656 (1961). Consumers have less frequently been prey to illegal boycotts, perhaps because a large class of victims cannot easily be coerced without destroying the secrecy on which illegal boycotts often depend. But the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' "ability to sell in accordance with their own judgment"; they can deprive consumers of the "freedom to buy . . . in an open competitive market"; and they "interfere with the natural flow of interstate commerce". *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* 359 U.S. at 212-13. The Ninth Circuit has held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.,* 356 F.2d 371, 376 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966).

Some commentators would artificially restrict the meaning of "boycott", apparently fearing an overbroad application of the rule that boycotts are illegal per se. *See* L. Sullivan, *Antitrust* §§83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anticompetitive and thus fit subjects for a per se rule, others are benign and not properly treated as illegal per se. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969) (boycott not illegal per se when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a per se rule to all acts falling within the ordinary meaning of the word "boycott".

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states were given authority to tax and regulate the business of insurance. This domain remains a vast one even if the boycott provision is read more broadly than appellees insist. McCarran-Ferguson would still insulate state tax and regulatory programs from challenges based on the dormant commerce clause. *See Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946). It would continue to protect the business of insurance from many federal regulatory statutes. *See, e.g., SEC* v. *National Securities, Inc., supra* (securities laws). Even within the antitrust field, McCarran-Ferguson would have great significance. Only the Sherman Act is made applicable to the business of insurance by the boycott provision; the Clayton and Federal Trade Commission Acts, for example, could still be "preempted" by state regulation. Moreover, not every violation of the Sherman Act can be characterized as an act of boycott, coercion, or intimidation. *See, e.g., United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) (use of "benign" means to maintain monopoly violates Sherman Act); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 43 (1911) (predatory pricing).

Nor would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired "boycott, coercion, or intimidation", for the boycott provision merely guarantees that "[n]othing in *this chapter* shall render the Sherman Act inapplicable" to boycotts and the like. 15 U.S.C. §1013(b) [emphasis

added]. The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving intact the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability. *See also Cantor* v. *Detroit Edison Co.*, —— U.S. —— (July 6, 1976). Indeed, *Parker* v. *Brown* may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies. Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity.

When we look to public policy, the limitation sought by appellees again lacks support. Throughout this century, preserving competition by means of the antitrust laws has been a continuing national purpose. A primary aim of antitrust law is assuring consumers the benefits of a free market economy. To exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of antitrust law. Such an interpretation also conflicts with the Supreme Court's view that the McCarran-Ferguson Act as a whole is meant to apply to

the relationship between policyholders and their insurers. *SEC* v. *National Securities, Inc., supra,* 393 U.S. at 460. The boycott provision presumably also reflects this concern for the insurer-insured relationship. On a broader scale, we note that legislative and judicial exceptions to the general rule favoring free competition have often been narrowed over the years. *See, e.g., Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (July 6, 1976) ("state action" exception restricted); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 785-88 (1975) ("learned profession" exception questioned); *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236 (1955) (refusing to extend "baseball" exemption to boxing); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951) (narrow view of Miller-Tydings "fair trade" exception). The McCarran-Ferguson Act is of course a legislative exception to the antitrust laws, and it deserves a fair reading.[5] But the artificial reading of the boycott provision that appellees urge on us can only be characterized as a judge-made expansion of the Act. We think the national commitment to a free market places a special burden on courts to think long and hard before creating such exceptions to the antitrust laws. In short, the usual reading of "boycott, coercion, or intimidation"

5. We cannot ignore, however, the great haste with which the Act was drafted and passed. The provision that all now agree is central to the Act—the exception of insurance to the extent that it is regulated by state law—did not appear in the Act until it was inserted by the House and Senate conferees. *See* 91 Cong. Rec. 488 (1945); *id.* 1945; *id.* 1396. Only at the last moment did a measure that was intended originally as a three-year moratorium on Sherman and Clayton Act coverage become a lasting exemption. This change was not noted in the conference report or the statement of the House conferees, *id.,* although it was uncovered by Senator Pepper in the floor debates. *Id.* at 1478.

does not lead to irrationality, nor does it pose a grave danger to state authority. It conforms to the nation's antitrust policies. We see no reason, therefore, to look to the legislative history for a special and narrow meaning of these words.

Nevertheless, in deference to the courts which have found support in that history, we have studied it in detail. The decision in *South-Eastern Underwriters, supra,* was issued on June 5, 1944. That decision approved an indictment charging that the members of an insurance underwriters' association "not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [association] members on [association] terms." 322 U.S. at 535. Following that decision, an intensive several-month period of discussion produced a compromise measure agreed to generally by the insurance industry. The right of states to collect taxes from insurance companies had been put in doubt; the states' tax collecting effort would normally take place between February 20 and March 10, 1945. Thus legislative consideration was expedited, debate taking place between January 25 and February 27, 1945. The reports accompanying the bills being debated both referred to the boycott provision, stating "These provisions of the Sherman Act remain in full force and effect."[6]

In the first Senate debate, on January 25, the boycott provision was broadened by a quickly accepted amendment

6. S. Rep. No. 20, 79th Cong., 1st Sess. (1945), accompanying S. 340; and H. Rep. No. 143, 79th Cong., 1st Sess. (1945).

from "Nothing contained in this section shall render the Sherman Act inapplicable to any agreement or act of boycott . . ." to "Nothing in this act . . ." 91 Cong. Rec. 479 (1945). The chief issue debated, reflecting Senator O'Mahoney's concern, was whether the act could be used to authorize attempts to monopolize. Senator Ferguson, a sponsor, gave the answer: "No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void . . . ." *Id.* at 480.

The bill was debated in the House on February 14. The language concerning "agreement" to boycott had been stricken in committee, but the deletion was challenged by Congressman Celler, who said his concern reflected the view of the Attorney General. Congressman Celler, in arguing for the restoration of "agreement" language, adverted to the danger of an oral blacklist being issued by large companies which "would frighten the wits out of all these small companies", and an agreement of "separation" barring a company whose agent wrote insurance for a blacklisted company from participation in "the self-constituted governing organizations". *Id.* at 1087. On Congressman McCormack's suggestion, language was accepted proscribing "any agreement to boycott, coerce, or intimidate". Much of the debate then focused on the nature of the moratorium of three years on the general application of the Sherman and Clayton Acts.

The bill went to conference. The House, on February 23, agreed to the conference report without debate. In the Senate, on February 26, Senator Pepper was concerned about states taking action during the moratorium period

which would defeat the purpose of the antitrust acts. Senator Ferguson replied that states could not, even during the moratorium, "interfere with the application of the Sherman Act to any agreement . . . or . . . act of boycotting". *Id.* at 1443. On the next day, Senator Pepper levelled his attack at the basic provision making the Sherman, Clayton, and Federal Trade Commission Acts permanently inapplicable to the extent that states had regulated the industry. His concern was that price fixing could continue with impunity. Senator O'Mahoney reassured him that private agreements enforcing certain rates would remain violations with the restoration of the "agreement" language taken out but restored by the House. He added:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision." *Id.* at 1480.

Senator Pepper was not satisfied, believing that states could legitimize and therefore insulate rating bureaus. Senator Ferguson pointed out that "there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate." *Id.* at 1481. He acknowledged that states would be permitted to authorize rating bureaus. Senator Pepper continued to gnaw at the issue, asking why the states should be given the right to "cloud" the Sherman and Clayton Acts. Again Senator O'Mahoney attempted reassurance by saying that there were three forms of regulation: state regulation permitted by the bill, federal regulation, which no one was urging, and private regulation by combinations "through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law". *Id.* at 1483. This latter type, he said, would be absolutely outlawed. Senator Pepper still felt that, with state-authorized rating bureaus being allowed by the bill, states were being given "carte blanche" to legitimize vices. *Id.* at 1484.

Senator O'Mahoney rejoined that "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 1485. After reading from the elaborate rules and regulations of a powerful association of insurance companies the Senator said, "The Insurance Executive Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." *Id.* at 1486.

Senator Barkley then asked if the boycott provision was sufficient to prevent combinations that do not involve boycott, coercion, or intimidation. Senator O'Mahoney replied,

> "[M]y judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the [boycott] section . . . . There are agree-

> ments and combinations in the public interests [sic] which can safely be permitted, but this agreement from which I have been reading is the sort of agreement which ought to be condemned . . . and which . . . would be completely outlawed." *Id.* at 1486.

The debate shortly ended and the conference report was accepted.

Assuming for the moment that we have license to go beyond the words of the statute, we cannot turn to the legislative history with our minds in equipoise. H. Hart and A. Sacks, *The Legal Process* 1264 (tent. ed. 1958). The plain meaning of the boycott provision, the strength of the nation's antitrust policies, and the substantial scope that an ordinary reading of the provision would leave to the McCarran-Ferguson Act—all these at the least create a presumption for the legislative history to overcome. Our question, then, is whether we can distill from this history the clear intent of Congress to limit "boycott, coercion, or intimidation" to acts or agreements affecting the relationships between insurance companies and their competitors and agents. The basis for appellees' argument lies in the remarks of Congressman Celler about the danger of blacklisting small companies and Senator O'Mahoney's remarks about the evil of private enforcement of private law by the companies. And it is true that at no point were any remarks directed to the possibility of boycotts, coercion, or intimidation aimed at consumers.

We would hesitate long before characterizing the Congressional intent as one narrowly restricting the boycott provision. We make two preliminary observations. The first is that *South-Eastern Underwriters,* which seems to

have been the ultimate source of the "boycott, coercion, or intimidation" language, apparently dealt in part with threats and boycotts directed at policyholders. 322 U.S. at 535. The second is that the insurance industry participated deeply in the drafting of this legislation; if the boycott provision were intended to cover less than what the Sherman Act would normally cover, one might suppose that the language would not have been left so bald and general.

Of more pertinence is the central role which the boycott provision played as the all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concerns of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that "boycott" was a code word confined to industry personnel. *See,* Levi *An Introduction to Legal Reasoning,* 15 U. Chi. L. Rev. 501, 522 (1948). The inescapable fact is that in this four-day debate the only specific references to evils were made on two occasions, once in the House and once in the Senate. Congressman Celler voted against the bill in the House and while Senator O'Mahoney was supporting the measure as an acceptable compromise and was on the committee of conference, he was not a sponsor. While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed Senator O'Mahoney referred to the Insurance Executives As-

sociation rules as "the sort of agreement" to be condemned. His summary answer to Senator Barkley that "every effective combination or agreement to carry out a program against the public interest" would be prohibited by the boycott section could not be more unrestricted.

We simply do not find in these debates or reports any evidence that would justify our reading the boycott provision in the special way urged by appellees. With all deference to the courts which have accepted the argument, we are reminded of the following advice of Mr. Justice Frankfurter:

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543-44 (1947).

We therefore reverse the lower court on this issue. The plaintiffs have charged the defendants with an unlawful boycott, and they are entitled to seek both injunctive relief and treble damages. *See Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2d Cir. 1963), cert. denied, 376 U.S. 952 (1964).[7]

7. We recognize that the dismissal could be affirmed if none of the plaintiffs have standing to sue. But the change in malpractice coverage has increased costs for the doctors. The alleged conspiracy

(footnote continued on next page)

The plaintiffs also object to the district court's decision to abstain on the plaintiffs' fraud claims, which were based on state law. In essence, plaintiffs pleaded that past and present insurance rates had been inflated by false statements to the public and the state insurance commissioner. Plaintiffs asked for restitution of all amounts paid in excess of a "fair and justifiable" malpractice insurance rate. Rhode Island courts have never ruled on the existence of a cause of action for recovery of excessive insurance premiums, but the district court noted that the state has provided elaborate administrative and judicial procedures for challenging existing rates. Rather than risk interfering with the state's regulatory scheme or misinterpreting state law, the district court abstained. Plaintiffs are apparently satisfied with the district court's decision to abstain with respect to insurance rates now in effect, for they do not appeal from that disposition. They do appeal from the court's abstention regarding past rates, which cannot be challenged administratively. The court's reluctance to take the case is understandable; recognizing a cause of action for the recovery of excessive past insurance premiums would profoundly affect the state's ratemaking machinery and policies. *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959). In cases like this, federal courts prefer to tread lightly, following trails already blazed by the

thus strikes at their "business or property", 15 U.S.C. §15, even if that phrase refers only to "commercial interests". *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). And no one is more directly injured by a conspiracy among insurance sellers than those who buy the insurance. *See generally*, L. Sullivan, *Antitrust* §247 (1976). Because the doctors named as plaintiffs have standing, we find it unnecessary to decide whether the patients have standing or not.

state courts. Nonetheless, the court's jurisdiction over this claim was founded on diversity of citizenship. Abstaining in a diversity case often means completely relinquishing the case to the state courts; it thus defeats the purposes behind the grant of federal jurisdiction. A less drastic step might have served the purposes of the grant without unduly interfering in state regulatory matters. In Rhode Island, a novel and controlling question may be certified from the federal courts to the state courts. *See Lehman Bros.* v. *Schein,* 416 U.S. 386 (1974); R. I. Sup. Ct. Rule 6.

The district court did not certify this question. Two reasons for its choice are now advanced. First, the court's unappealed decision to abstain on the present rate question means that state courts and administrators will soon be wrestling with plaintiffs' claim, and it would not serve judicial economy for the federal court to begin work on a closely related claim. Second, even if a cause of action for recovering past premiums is proper, the federal court should abstain for fear of disrupting important state concerns. We doubt that either of these factors alone would permit abstention when balanced against the duty imposed on every federal court to decide cases within its jurisdiction. *See Meredith* v. *Winter Haven,* 320 U.S. 228 (1943). In combination, however, they persuade us that abstention was justifiable. *See Louisiana Power & Light Co.* v. *City of Thibodaux, supra,* 360 U.S. at 27 n. 2.

Appellants also object to the granting of summary judgment to two defendants, the Aetna and St. Paul insurance companies, on a count charging fraud in the sale of certain "consent to rate" policies. Plaintiffs offered

no evidence that any named physician-plaintiff ever bought such a policy from either Aetna or St. Paul, nor that any named patient-plaintiff was ever treated by a doctor holding such a policy. Appellants thus had at best only a tenuous right to bring this claim against these companies, *Haas* v. *Pittsburgh Nat'l Bank,* 526 F.2d 1083 (3d Cir. 1975), and we find no error in the district court's decision to adhere strictly to the traditional rules. *La Mar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461, 469 (9th Cir. 1973). *See also O'Shea* v. *Littleton,* 414 U.S. 488, 494-95 (1974).

The district court disposed of the remaining charges of fraud in "consent to rate" policies by referring to Fed. R. Civ. P. 9(b). Rule 9(b) requires complaints charging fraud to state "with particularity" the circumstances constituting fraud. The judge found that the complaint did not meet the standards set by rule 9(b) and dismissed the count without prejudice. The judge was correct; the complaint could hardly be more vague. While the judge might have ordered a more definite statement, it was within his power to grant a dismissal without prejudice. If the plaintiffs can plead fraud with more particularity, they may file an amended complaint. 2A Moore's Federal Practice ¶9.03 p. 1934.

Affirmed in part; reversed and remanded in part.

Appendix A

Dissenting Opinion

CAMPBELL, *Circuit Judge* (dissenting in part). The court seems to me to be straining mightly to reinterpret the legal relationship ordinarily understood to have been established under the McCarran-Ferguson Act, perhaps because it has some doubts about the policies of that Act.

The McCarran-Ferguson Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest", 15 U.S.C. §1011, and "shall be subject to the laws of the several States which relate to the regulation or taxation of such business", §1012(a).[1] The Act goes on to say that no Act of Congress shall invalidate, impair or supersede state regulatory laws, §1012(b). Finally, it provides that the various antitrust statutes, including the Sherman Act, shall apply only to the extent a state does not exercise its right to regulate, §1012(b). The court concedes, as do the parties, that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business. Thus, under the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the §1013(b) exception permits. That exception provides, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or in-

1. The Supreme Court has said that "[t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance' " covered by the McCarran-Ferguson Act. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Appendix A

timidate, or act of boycott, coercion, or intimidation." Significantly this language does not track the broad "contract, combination . . . or conpiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.

While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts—every court except, now, ourselves—have held that the §1013(b) exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. *See, e.g., Meicler* v. *Aetna Casualty & Surety Co.*, 372 F. Supp. 509, 513-14 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975). The legislative history indicates that the former problem was what worried Congress when it enacted the exception, and a narrow reading is more consistent with §1012 and with the purpose and structure of the act generally.[2] Indeed, to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law

2. I do not question that the boycott-coercion-intimidation language might in some other context be pushed to the limits which the court approves. But these words are hardly so focused as to permit only the broadest, most general meaning. A more limited interpretation, besides comporting with the statutory structure and the legislative history, squares with the Supreme Court's definition of a group boycott as "concerted refusals by traders to deal with other traders",

(footnote continued on next page)

into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act. Only if, like all other courts, we read §1013 (b) as dealing with a limited type of problem which troubled Congress does the exception fit sensibly into the statute as a whole.

The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policy holders —is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purposes of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the poten-

Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). *See* L. Sullivan, Antitrust §90 at 257 (1976).

Furthermore, even reading the boycott exception to include the complained of behavior does not wholly solve the question of plaintiffs' standing. If St. Paul is attempting to corner the malpractice market, the more obvious harm is to those companies that are being closed out. It can be argued that the higher prices to doctors are only an indirect consequence and that the physicians have not suffered the sort of direct injury necessary to bring suit. *See Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 49 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (plaintiff must show himself to be in sector of economy in which violation threatens to break down competitive conditions). This sort of problem suggests that the doctors' ostensible antitrust action is aimed less at protecting the free market system than at consumer protection goals left by Congress to state regulation. *See generally SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

tial for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act.

This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforeseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment.

I shall not attempt to deal with the legislative history which my brothers make much of, beyond saying that, like most legislative history, it is capable of being argued both ways depending on which legislator one reads and to whose views one ascribes final authority. Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other courts have adopted to date. More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that §1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act. Under my brothers' reading, the tail now wags the dog.

I would affirm the district court which acted, I think, correctly and in accordance with all existing law.

Appendix B

Opinion of the District Court of the United States for the District of Rhode Island

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 75-176

DAVID M. BARRY, M. D. *et al.*

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*

OPINION

(Rendered orally from the bench November 19, 1975)

PETTINE, Chief Judge. This is a class action brought on behalf of practicing physicians licensed to practice medicine in the State of Rhode Island and on behalf of citizens of Rhode Island who are presently under the care of physicians or who may require medical care in the future. The action is brought against four insurance companies, licensed to sell insurance in the State of Rhode Island, who are, and have been, engaged in selling medical malpractice insurance to physicians, hospitals, and other medical personnel in Rhode Island. The plaintiffs' amended

complaint alleges, in essence, that the four defendants have conspired to monopolize the business of selling medical malpractice in Rhode Island and, in violation of both federal antitrust law and state common law have, through various unfair trade practices and fraudulent misrepresentations, obtained the approval by the State Insurance Commissioner of excessive medical malpractice premium rates and have thereby been unjustly enriched at the plaintiffs' expense. Plaintiffs seek injunctive relief and $100,000,000 in damages. The case is presently before the Court on several motions by the defendants for dismissal on various grounds of all four counts of the complaint and for summary judgment on one of the counts.

I. COUNT I

Count I of the plaintiffs' amended complaint purports to set forth a private action under the federal antitrust laws. The gravaman of Count I is that the four defendant insurance companies violated sections 1 and 2 of the Sherman Act by conspiring to deny any medical malpractice insurance coverage on an occurrence basis to providers of medical services insured under malpractice policies issued by defendant St. Paul and by conspiring that defendants Aetna, Travelers, and Hartford would refuse to accept any applications for medical malpractice insurance of any type from providers presently insured by St. Paul. Plaintiffs contend that these conspiracies have been effectuated by a collective refusal to deal, by unfair insurance rate discrimination, by agreements not to compete, and by horizontal price fixing, and that the defendants have engaged in a

purposeful course of coercion, intimidation, boycott, and unfair competition with respect to the sale of medical malpractice insurance in Rhode Island.

All four defendants have moved that Count I be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that plaintiffs' claims under the Antitrust Acts are barred by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, which allegedly exempts the defendants' challenged activities from the Antitrust Acts. In addition, three defendants have also argued that Count I should be dismissed because events occurring subsequent to the events alleged in Count I have rendered plaintiffs' action moot. The Court need not reach this mootness question because I find that Count I of the plaintiffs' amended complaint is barred by the McCarran Act.

The McCarran Act provides in pertinent part:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948 . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law."
> 15 U.S.C. §1012(b).

The Act also contains the following exception:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to

> boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."
> 15 U.S.C. §1013(b).

It is not contested that the subject of this action is the "business of insurance." This case involves the relations between the defendant insurers and the insured physicians and hospitals,[1] the types and terms of the policies that are or that plaintiffs claim ought to be sold, and the rates to be charged therefor. These matters are precisely those aspects of the business of insurance Congress was considering in the McCarran Act:

> "Congress was concerned with the type of state regulation that centers around the contract of insurance . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' . . . [I]t is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'"
> *S.E.C.* v. *National Securities, Inc.,* 393 U.S. 453, 460 (1969).

Nor is it contested that the business of insurance is extensively regulated by the State of Rhode Island. For example, every foreign insurance company must obtain a license from the Insurance Commissioner each year before it

1. Although none of the named plaintiffs are hospitals, plaintiffs apparently consider hospitals in Rhode Island to be a part of the plaintiff class. All questions relating to class certification have been deferred until after resolution of the present motions.

can transact business in Rhode Island, R.I. Gen. Laws §27-2-11, and premium rates may not be excessive or unfairly discriminatory, R.I. Gen. Laws §27-9-4. Moreover, chapter 27-29 of Rhode Island's General Laws, entitled "Unfair Competition and Practices" was enacted with the explicit purpose of regulating the very misconduct and practices that, but for the McCarran Act, would be controlled by federal antitrust laws:

> "The purpose of this Chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of congress of March 9, 1945 (public law 15, 79th congress) [i.e., the McCarran Act] by defining—or providing for the determination of—all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined."
> R.I. Gen. Laws §27-29-1.

In addition, the area of medical malpractice insurance has been singled out for more particular state regulation and control by Emergency Regulation XXI, issued by the Rhode Island Director of Business Regulation, Insurance Division, which went into effect on June 16, 1975.[2]

Since the defendants' alleged misconduct involves aspects of the insurance business regulated by state law, the

2. Under the Emergency Regulation was created the Medical Malpractice Joint Underwriting Association of Rhode Island, which represents a new and comprehensive program for the provision of medical malpractice insurance in Rhode Island. Under the program, every insurer authorized to write personal injury liability insurance in Rhode Island is required to participate in the Association and to assist in the provision of medical malpractice insurance to providers of medical services in Rhode Island.

plaintiffs' private antitrust action is barred by the McCarran Act unless it falls within the exception for boycotts, coercion, or intimidation, 15 U.S.C. §1013(b), quoted *supra*. This Court is persuaded that, despite this provision's broad wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case.

Both Courts of Appeals that have considered similar attempts to invoke the exception in 15 U.S.C. §1013(b) have concluded that such an application of the exception would be contrary to the legislative history of the Act and would "emasculate" and "vitiate" the Act and frustrate its purposes. *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975); *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974). *See also Transnational Insurance Co.* v. *Rosenlund*, 261 F.Supp. 12 (D.Ore. 1966). These cases hold that the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being "black-listed" by powerful combinations of insurance companies, not to affect the insurer-insured relationship. Thus, the District Court in *Meicler*, *supra*, explained:

> "This Court is convinced that Plaintiffs' reliance on §1013(b) is misplaced. It cannot be disputed that the terms boycott and coercion, as commonly defined, might be construed to encompass the type of activity attributed to Defendants in the instant case. An examination of the legislative history of this section reveals, however, that Congress was seeking to regulate a rather

> narrow area of activity bearing no resemblance to the situation described in Plaintiffs' Complaint. Section 1013(b) was designed primarily to deal with conspiracies or combinations among insurance companies and agents for the purpose of boycotting or refusing to deal with other insurance companies and agents. There is nothing in the legislative history or case law bearing on this section to indicate that it is applicable to a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates."
> 372 F.Supp. 509, 513-14 (S.D. Tex. 1974).

"[T]o hold otherwise," wrote the Ninth Circuit in *Addrisi, supra,* "would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship." 503 F.2d at 729.

This Court agrees with the interpretation of the legislative history of 15 U.S.C. §1013(b) presented in the *Meicler, Addrisi,* and *Rosenlund* decisions, *supra,* and adopts it as its own. Plaintiffs have failed to uncover any portion of the legislative history that would justify a contrary conclusion. The plaintiffs do cite and heavily rely upon the case of *Battle* v. *Liberty Nat'l Ins. Co.,* 493 F.2d 39 (5th Cir. 1974), *rehearing denied,* 503 F.2d 567, *cert. denied,* 419 U.S. 1110 (1975), however, contending that *Battle* stands for the proposition that §1013(b) can be applied to protect consumers as well as insurance companies and agents. The plaintiffs in *Battle,* however, were not insurance policyholders but rather business representatives of the insurance companies sued:

> "The plaintiffs in this class action are funeral homes and directors of funeral homes who allege that the defendants [insurance companies] are liable to them for violating the antitrust laws. . . . When the funeral home director signs a contract with [insurance companies], his funeral home becomes an 'authorized home for *servicing and furnishing merchandise to Liberty National burial insurance policyholders'.*"
> 393 F.2d at 42, 43. (emphasis added).

Thus, individual insureds were not parties to the action, and no exception to the McCarran Act was claimed for them. Furthermore, it should be noted that *Battle* was decided by the Fifth Circuit before it decided *Meicler* v. *Aetna Casualty & Surety Co., supra.* To the extent there is any inconsistency between the two cases, *Meicler* must be read as implicitly overruling *Battle.*

Plaintiffs in this case are individual insureds and their antitrust claims are thus not exempted by section 1013(b) from the limitations of the McCarran Act. Count I of plaintiffs' amended complaint is therefore dismissed.

II. COUNTS II, III, and IV

Count II of the plaintiffs' amended complaint is a diversity action based on the claim that the premium rates charged by the defendants for their malpractice insurance, as approved by the Rhode Island Insurance Commissioner, were excessive and were obtained by fraudulently concealing material facts, furnishing false information, and making material misrepresentations. Counts III and IV, also diversity actions are based on the conduct set forth in Counts I and II and allege that as a result of the defendants' fraudulent acts, Rhode Island was forced to create

a state agency to underwrite medical malpractice insurance that charges excessive premium rates, and certain plaintiff physicians were induced to purchase malpractice insurance at rates in excess of the maximum rates established by the Rhode Island Insurance Commissioner.

All the defendants have moved that Counts II, III, and IV of the amended complaint should be dismissed on the grounds that the allegations of fraud contained therein have failed to satisfy the special pleading requirements of Federal Rule of Civil Procedure 9(b). In addition, three of the defendants have moved that Counts II and III should be dismissed because plaintiffs failed to exhaust their state administrative remedies, or, in the alternative, that the Court exercise its discretion to abstain from exercising jurisdiction over these counts. These defendants have also moved for summary judgment in their favor on Count IV on the grounds that none of the named plaintiffs have any complaints against these defendants on the grounds alleged in Count IV and they therefore lack standing to bring the claims set forth in Count IV and are not members of the class they seek to represent.

The Court need not reach these questions, however, because it appears on consideration of a motion by defendant Travelers that this Court lacks jurisdiction to entertain any of the claims plaintiffs put forth in Counts II, III, and IV. As indicated *supra,* these three counts are all premised on diversity jurisdiction under 28 U.S.C. §1332. There is evidence before the Court, however, in the form of a communication from the Department of State of the State of Rhode Island, that defendant Travelers Indemnity Company of Rhode Island is a Rhode

Island Corporation. Since the named plaintiffs are all citizens of Rhode Island, there is a lack of complete diversity between all the plaintiffs on the one hand and all the defendants on the other, and thus under the well established rule there is no basis for the exercise of federal diversity jurisdiction. *Smith* v. *Sperling,* 354 U.S. 91 (1957); *Strawbridge* v. *Curtiss,* 3 Cranch. (7 U.S.) 267 (1806).[3]

Moreover, this it not an appropriate case for the Court to take pendent jurisdiction over Counts II, III, and IV. Even where the federal claim to which the state claims are to be appended is a substantial one, "pendent jurisdiction is a doctrine of discretion, not of plaintiffs' right. . . ." *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1965). The policies underlying pendent jurisdiction are less significant when the federal claim is a weak one, and the Supreme Court has stated flatly that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* Although the Court has since retreated somewhat from this hard and fast rule, in *Rosado* v. *Wyman,* 397 U.S. 397, 404 (1970), where substantial time and energy had been expended toward resolution of the state claim, such considerations are not present here. This litigation is less than six months old, and all discovery has been stayed pending resolution of the present motions. In the words of the American Law Institute:

3. There is no basis in this case for a realignment of the parties, such as occurred in *Broidy* v. *State Mut. Life Assur. Co. of Worcester, Mass.,* 186 F.2d 490 (1951) or *Robinson* v. *Warner,* C.A. No. 5253 (D.R.I. 1973), that could sustain diversity jurisdiction.

> "If the federal element that is the basis for jurisdiction is disposed of early in the case, as on the pleadings, it smacks of the tail wagging the dog to continue with a federal hearing of the state claim."
>
> American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, at 213, quoted in *McFadden Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 427 (2d Cir. 1965), *cert. denied* 382 U.S. 1026.

A further reason for refusing pendent jurisdiction in this case is the Supreme Court's admonition that federal courts avoid needless decisions of state law, "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America* v. *Gibbs, supra,* 383 U.S. at 726. It is clear from the defendants' motions to dismiss Counts II, III, and IV on grounds other than lack of jurisdiction that the ultimate resolution of the plaintiffs' claims in this case would require explorations of several novel questions of state law, such as whether the administrative remedies provided by Rhode Island's statutes regulating the insurance industry were intended by the state legislature to totally preempt any common law causes of action which may have existed for recovering excessive insurance premiums.[4] It is also

4. In *Catalano* v. *Department of Hospitals of the City of New York,* 299 F.Supp. 166, 175 (S.D.N.Y. 1969), the Court refused to exercise pendent jurisdiction over a claim turning on the construction of a New York Social Services law on the grounds that the claim "presents a question of state legislative intent and delegation of powers to an administrative body, which more appropriately lies within the ambit of the state court's expertise with respect to its own laws."

noteworthy that the problem of medical malpractice insurance is currently the subject of intense public debate in Rhode Island, and the state government has recently taken major affirmative steps to come to grips with the problems in this area. These factors alone, of course, would not preclude this Court from taking pendent jurisdiction over Counts II, III, and IV, but when they are considered in light of the dismissal of the federal claim, the early stage of this litigation, and the complex questions of state law that are presented, I conclude that it would verge on an abuse of my discretion to exercise pendent jurisdiction in this case.

All four counts of the plaintiffs' amended complaint are hereby dismissed

/s/ RAYMOND J. PETTINE

Chief Judge

Nov. 25, 1975

Appendix C

Amended Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 75-0176

David M. Barry, M.D., Leroy S. Chapnick, M.D., Walter C. Cotter, M.D., Paul J. M. Healey, M.D., Anthony F. Merlino, M.D., Paul B. Metcalf, M.D., H. Gerald Rock, M.D., and Rosario V. Tomaselli, M.D.

and

Penny Andrew, Constance V. Boisse, Christopher Daniels, Arthur M. Ferland, Gladys L. Spaight, and Alphonse D. Vitullo

v.

St. Paul Fire & Marine Insurance Co., Aetna Casualty & Surety Co., Travelers Indemity of Rhode Island, Travelers Indemnity Co. of Rhode Island, Travelers Insurance Co., Hartford Casualty Company and Hartford Fire Insurance Co.

AMENDED COMPLAINT

COUNT I

I

JURISDICTION

1. This action arises under the Sherman Anti Trust Act §§1 and 2 (15 U.S.C.A. §§1 and 2) and Clayton Act §§4 and 16 (15 U.S.C.A. §§15 and 26) as hereinafter more fully appears.

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2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs, and arises under the laws of the United States (28 U.S.C.A. §1331).

3. The matter in controversy arises under an act of Congress regulating commerce and protecting trade and commerce against unreasonable restraints and monopolies (28 U.S.C.A. §1337).

II

PARTIES

1. Plaintiffs DAVID M. BARRY, M.D., of Providence, Rhode Island, LEROY S. CHAPNICK, M.D., of North Providence, Rhode Island, WALTER C. COTTER, M.D., of Providence, Rhode Island, PAUL J. M. HEALEY, M.D., of Rumford, Rhode Island, ANTHONY F. MERLINO, M.D., of North Providence, Rhode Island, PAUL B. METCALF, JR., M.D., of Pawtucket, Rhode Island, H. GERALD ROCK, M.D., of Warwick, Rhode Island and ROSARIO V. TOMASELLI, M.D., of Providence, Rhode Island are practicing physicians licensed to practice medicine in the State of Rhode Island, who bring this action on behalf of themselves and all other similarly situated physicians who are licensed to practice in the State of Rhode Island.

2. Plaintiffs PENNY ANDREW of Pawtucket, Rhode Island, CONSTANCE V. BOISSE of Pawtucket, Rhode Island, CHRISTOPHER DANIELS of Pawtucket, Rhode Island, ARTHUR M. FERLAND of Providence, Rhode Island, GLADYS L. SPAIGHT of East Providence, Rhode Island and ALPHONSE

D. VITULLO of Barrington, Rhode Island are citizens of the State of Rhode Island presently under the care of physicians, and who are or may require medical care in the future, who bring this action on behalf of themselves, and all persons presently receiving medical care and attention, or who in the future may require medical care and attention from physicans and medical personnel in the State of Rhode Island.

3. The within action is maintainable as a class action be each of the aforedescribed classes of plaintiffs because:

a. Each class is so numerous that joinder of all its members is not practical.

b. There are questions of law or fact common to each class.

c. The claims of the representative parties are typical of the claims of their respective Classes.

d. The representative parties will fairly and adequately protect the interests of their respective classes.

4. The defendants, St. Paul Fire & Marine Insurance Co., (hereinafter referred to as "St. Paul") and Aetna Casualty & Surety Co., (hereinafter referred to as "Aetna"), are each national corporations licensed to sell insurance in the State of Rhode Island, all of which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

5. The defendants, Travelers Indemnity of Rhode Island, Travelers Indemnity Co. of Rhode Island and Travelers Insurance Co., (hereinafter collectively referred to as "Travelers") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

6. The defendants, Hartford Casualty Company and Hartford Fire Insurance Co., (hereinafter collectively referred to as "Hartford") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

III

NATURE OF INTERSTATE COMMERCE

7. Defendants, St. Paul, Aetna, Travelers and Hartford are corporations which presently are and have been for a long time prior hereto, engaged in the business of selling general liability insurance on a national scale, including the sale of such general liability insurance in the state of Rhode Island.

8. The defendants' insurance businesses are not separated into fifty (50) distinct territorial compartments which function in isolation from each other. Inter-relationships, interdependence and integration of activities in all of the states in which they operate are practical aspects of the defendants' methods of doing business.

9. All named defendants are, at the present time, and have, for a long period been, engaged in selling medical malpractice insurance to physicians, hospitals and other medical personnel in the state of Rhode Island and elsewhere throughout the United States within the ordinary conduct of their business. Premiums for this medical malpractice insurance are being, and have been, received from physicians, hospitals and other medical personnel in the state of Rhode Island and are and have been applied by the defendants in various aspects of the operation of their business outside the state of Rhode Island.

10. The defendant corporations own property, pay taxes, insure personnel, firms and corporations and otherwise engage in commerce throughout the United States.

11. Plaintiff physicians and hospitals are engaged in interstate commerce in that they purchase goods and materials from sources located throughout the United States, purchase and sell services from and to residents of other states, give medical education to persons who practice or who go on to practice medicine in various states, and engage in research, development and scientific studies for the advancement of medicine, health services and the cure

and treatment of diseases, and for the health of and to the benefit of persons throughout the United States.

IV

Cause of Action

12. The defendants, St. Paul, Aetna, Travelers, and Hartford over a period of years have so conducted their respective businesses of selling medical malpractice insurance in the State of Rhode Island that they have, at the present time, acquired a total monopoly in the sale of medical malpractice insurance to the end that all physicians, hospitals and other medical personnel buying medical malpractice insurance in the State of Rhode Island buy said insurance from defendants, St. Paul, Aetna, Travelers, and Hartford.

13. In establishing the aforesaid monopoly, the defendant corporations have created a condition whereby all physicians, hospitals and other medical personnel in the State of Rhode Island have come to rely upon said defendants for their medical malpractice insurance.

14. Said defendant corporations, and each of them, for a great number of years have realized large profits from the sale of medical malpractice insurance in the State of Rhode Island.

15. Said defendant corporations and each of them, for a great number of years have realized large profits from the sale of insurance other than medical malpractice in-

surance to persons, firms, and corporations in the State of Rhode Island.

16. Said defendants and each of them, have been permitted to realize said large profits from the sale of medical malpractice and other insurance by virtue of the fact that they have been licensed by the Insurance Commissioner of Rhode Island to sell insurance within the State of Rhode Island.

17. By virtue of the grant of said license to sell insurance in the State of Rhode Island, and by virtue of their creation of a monopoly in the sale of medical malpractice insurance, the defendant corporations, and each of them have obligations to the members of each of the aforementioned plaintiff classes and to the citizens of the State of Rhode Island concomitant with or counterbalancing to the aforesaid licenses and privilege granted them.

18. By virtue of having created the aforesaid monopolies in the sale of medical malpractice insurance, said defendant corporations have caused all physicians, hospitals and other medical personnel as well as all patients and prospective patients and tax payers in the State of Rhode Island to be in a position of vulnerability and total depenence upon the good faith, integrity, and fairness of the defendant corporations.

19. For a long period of years, the plaintiff physicians, hospitals and other medical personnel have become accustomed to renewing their medical malpractice insurance with the defendant companies, and have come to rely on

the fact that such insurance would be renewed, and upon a reasonable price bearing a reasonable relation to economic conditions.

20. The defendants and each of them are, and have been, aware that under the present social and economic conditions, it is virtually impossible for a physician, hospital or other medical personnel to engage in the practice of medicine or provide medical services or treatment without medical malpractice insurance.

21. Defendant St. Paul is the largest single carrier of medical malpractice insurance in the State of Rhode Island, insuring approximately six hundred (600) physicians, and numerous hospitals within the State, all of which is known and has been known to defendants Aetna, Travelers and Hartford.

22. Defendants St. Paul, Aetna, Travelers, and Hartford in the past had established a policy of accepting applications for medical malpractice insurance from any and all qualified physicians, hospitals or other medical personnel within the State.

23. Almost all current medical malpractice insurance policies written by defendant, St. Paul for physicians, hospitals and other medical personnel in the State of Rhode Island bear an expiration date of June 30, 1975, all of which is known, and has been known to defendants Aetna, Travelers and Hartford.

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24. All medical malpractice insurance policies written by defendants, St. Paul, Aetna, Travelers, and Hartford in the State of Rhode Island and elsewhere throughout the United States have always been written on a so called "Occurrence Basis". ("Occurrence-type" insurance covers the insured provider of medical services for every claim that arises or might arise from any act done during the time when the insurance coverage was in force.)

25. Upon information and belief, all medical malpractice insurance written by each insurance carrier throughout the United States has always been written on a so called "Occurrence Basis".

26. Upon information and belief, no medical malpractice insurance has ever been written any where in the United States on a "Claims Made" basis.

27. "Claims Made" insurance purports to insure the medical service provider only on the basis of insuring against those claims which are actually made and filed during the year in which the insurance is in force and effect, without regard as to when the alleged act of malpractice occurred. Thus, a medical service provider would have to buy a minimum of four (4) one-year policies in order to have coverage comparable to an "occurrence-type" policy.

28. On or about April 18, 1975, defendant, St. Paul, notified plaintiff physicians that under no conditions would it renew any of its "occurrence-type" medical malpractice insurance policies then in force and due to expire on June

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30, 1975, but that it would issue to its insured one (1) year medical malpractice policies on a "Claims Made" basis only.

29. In addition, said defendant, St. Paul, has notified certain hospitals insured by it that their medical malpractice insurance then in force and due to expire on June 30, 1975, would not be renewed under any conditions.

30. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on an "Occurrence Basis" to all of the physicians insured with defendant, St. Paul, at said time.

31. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on any basis to certain hospitals insured with defendant, St. Paul, at said time.

32. In furtherance of the aforesaid unlawful combination and conspiracy, defendants, Aetna, Travelers and Hartford have made and carried out the policy of refusing, and have refused from April 18, 1975, to the present time, to accept any applications for medical malpractice insur-

ance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul.

33. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action among the defendants, the effect of which has been to place the physicans and hospitals and other medical personnel insured by St. Paul in the State of Rhode Island in a dilemma, whereby they can purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that purchase must be made on terms dictated by the defendant, St. Paul.

34. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action the object and result of which has been a stifling of competition in the medical malpractice insurance market in Rhode Island, has given an exclusive monopoly to defendant St. Paul for the sale of medical malpractice insurance over six hundred (600) physicians and numerous hospitals and has, in effect, threatened to deprive said six hundred (600) physicians and numerous hospitals of their right to acquire medical malpractice insurance on a reasonable basis, and thus their right to engage in the practice of medicine and to provide medical services, all for no justifiable business reason.

35. Defendant St. Paul, in concert with defendants, Aetna, Travelers, and Hartford has engaged in a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island.

V

Damages

36. As a result of the aforesaid actions of the defendants, the physicians of Rhode Island insured by defendant, St. Paul, have been placed in the position where they are unable to obtain medical malpractice insurance on a reasonable basis after June 30, 1975.

37. As a result of the aforesaid actions of the defendants, the physicians of the State of Rhode Island may be forced to withhold medical services and disengage from the practice of medicine, except on an emergency basis, as a result of which the plaintiff patients and prospective patients will be deprived of medical care and treatment; and the health, safety, welfare and lives of the citizens of Rhode Island will become endangered.

38. As a result of the aforesaid actions of the said defendants, if medical services of the physicians are withheld, the hospitals in the State of Rhode Island will encounter grave financial difficulty, and some of them are in danger of becoming insolvent.

39. As a result of the aforesaid actions of the defendants, the plaintiff physicians are being deprived of their right to practice their profession and to earn a living in the State of Rhode Island.

40. The aforesaid unlawful combination and conspiracy has consisted of a continuing agreement and concert of action among the defendant co-conspirators, the substantial terms and objects of which have included:

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a. A collective refusal to deal with and insure on an occurrence basis over six hundred (600) physicians and numerous hospitals presently insured by defendant, St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the State of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

41. As a result of the foregoing, the health, welfare and public interest, and in fact, the entire economy of the State of Rhode Island are gravely and seriously threatened.

42. By reason of the foregoing, plaintiff physicians will suffer great losses of revenue, plaintiff hospitals will suffer great loss of profits and plaintiff patients will be forced to

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pay great sums of money in the form of increased rates for hospital and medical care and attention in the future.

WHEREFORE, plaintiffs demand:

1. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting or to deny, refuse or interfere with the plaintiff physicians and hospitals in the purchase or acquisition of medical malpractice insurance on an "occurrence basis" at reasonable rates, and from acting in concert or combination in this regard.

2. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert or combination as follows, or having the following objectives:

a. A collective refusal to deal with and insure on an "occurrence basis" all physicians and hospitals presently insured by defendant St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint of or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the state of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

3. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert and combination to coerce, intimidate or compel plaintiffs to act in any given manner with reference to the purchase of medical malpractice insurance, including, without limiting the generality of the foregoing, coercing or compelling any plaintiff physician to purchase medical malpractice insurance solely from defendant St. Paul or any other defendant insurance company.

4. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from entering into, adhering to renewing, maintaining or furthering directly or indirectly, any like or similar combinations and conspiracies to restraining trade and commerce in the sale of medical malpractice insurance in the state of Rhode Island as hereinbefore alleged.

5. That this court ascertain the damages suffered by plaintiffs by reason of the unlawful acts of the defendants herein complained of and award judgment in favor of the named plaintiffs, the members of the plaintiff classes and against the defendants, and each of them, for thrice the amount of said damages, costs and a reasonable attorneys' fee.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

COUNT II

I

JURISDICTION

1. Jurisdiction is based upon diversity of citizenship of plaintiffs and defendants under the provisions of (28 U.S.C.A. §1332).

2. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

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III

CAUSE OF ACTION

7. Defendants St. Paul, Aetna, Travelers and Hartford since the inception of their offering medical malpractice insurance in the State of Rhode Island have been obligated and required by law to make certain disclosures of information regarding the operation and finances of their respective businesses, including, without limitation, with respect to the sale of medical malpractice insurance, the collection of premiums therefor, and the payment of claims.

8. On the basis of the aforesaid information furnished by the defendants to the Insurance Commissioner of the State of Rhode Island and to the plaintiffs, premium rates for medical malpractice insurance have been established.

9. On the basis of the aforesaid information furnished by said defendants, plaintiff physicians have, at all times herein mentioned, been paying premiums for medical malpractice insurance to said defendant companies.

10. Plaintiffs allege that defendants, and each of them, in violation of their obligations to plaintiffs and to the general public, fraudulently and deceitfully:

a. Failed to disclose material facts to the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island.

b. Actively concealed material facts from the plaintiffs, the general public, and the Insurance Commissioner of the State of Rhode Island.

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c. Furnished false information to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

d. Made material misrepresentations to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

11. Plaintiffs allege that defendants, and each of them, during the course of contract negotiations with plaintiff physicians for the purchase and sale of medical malpractice insurance for sale in the State of Rhode Island, fraudulently and deceitfully:

a. Failed to disclose material facts.

b. Actively concealed material facts.

c. Furnished false information.

d. Made material misrepresentations.

12. At all times herein mentioned, defendants, and each of them, knew or should have known of the falsity and misleading nature of the aforesaid information and misrepresentations.

13. Defendants, and each of them, made said false disclosure, concealed said information, and made said misrepresentations with the intent that the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island be deceived thereby and rely thereon.

14. The plaintiffs at all times herein mentioned, have been unable to acquire the correct information concerning

such material facts, and until the filing of the within Complaint, have been ignorant of the true nature thereof.

15. Plaintiffs have at all times herein mentioned, relied on the aforesaid false information, and misrepresentations to their detriment.

16. As a direct result thereof, plaintiff physicians have, at all times herein mentioned, purchased medical malpractice insurance at premiums far in excess of the fair and justifiable rate which should have been charged them in accordance with current market conditions and the law.

17. As a direct result thereof, plaintiff patients have, at all times herein mentioned, been required to pay charges for medical treatment and hospitalization far in excess of fair and justifiable charges in accordance with the current market conditions, said excess charges being directly attributable to the unreasonably high premiums for medical malpractice insurance charged physicians and hospitals by said defendants as described herein.

WHEREFORE:

a. Plaintiff physicians demand that the defendants, and each of them, be ordered to make restitution to them of all premiums charged them in excess of the fair and justifiable rate which should have been charged from the inception of the offering and sale of medical malpractice insurance in the State of Rhode Island by the defendants to them.

b. Plaintiff patients demand that defendants, and each of them, be ordered to make full restitution to

them for all charges for medical attention and hospital care paid by them in excess of the fair and justifiable charges which should have been made, since the inception of the offering and sale of medical malpractice insurance by the defendants to physicians and hospitals in the State of Rhode Island.

c. Plaintiff physicians and patients demand that defendants, and each of them, be ordered to pay counsel fees, compensatory and punative damages in such sums as the court shall determine fair and justifiable.

COUNT III

I

JURISDICTION

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

III

CAUSE OF ACTION

7-13. Paragraphs 7 through 13 of Section III of Count II are hereby incorporated by reference.

14. After making said false misrepresentations and disclosures, and fraudulently concealing said information, defendant St. Paul, announced that it would refuse to renew any of its policies of medical malpractice insurance for physicians commencing July 1, 1975 on any basis other than "claims-made", which they knew, or should have known, would be totally unacceptable to all their insured physicians.

15. Defendants, Aetna, Travelers and Hartford, at the same time, and thereafter, refused to offer medical malpractice insurance to any of defendant St. Paul's customers under any conditions whatsoever, thereby putting some six hundred (600) plaintiff physicians in a dilemma, wherein they could purchase medical malpractice insurance from St. Paul only, and then under conditions dictated by St. Paul; to wit, a "claims-made" basis.

16. The actions of defendants, and each of them, complained of in Counts I, II and III hereof, created a situation in the State of Rhode Island whereby the Governor, in order to provide medical malpractice insurance for physicians and assure the availability of health services to the citizens of the State of Rhode Island, including, but not limited to the class of plaintiff patients, was obligated to establish a joint underwriting association through which all physicians in the State of Rhode Island are obligated by law to purchase their medical malpractice insurance.

17. Upon information and belief, the rates for said medical malpractice insurance under said joint under-

writing authority will be substantially in excess of the rates previously paid by plaintiff physicians and of the rates which should have been paid by plaintiff physicians in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

18. As a direct result thereof, plaintiff patients will be forced to incur expenses for medical services and hospitalization far in excess of what they should be charged in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

COUNT IV

I

JURISDICTION

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

Appendix C

III

CAUSE OF ACTION

7-15. Paragraphs 7 through 15 of Section III of Count II are hereby incorporated by reference.

16. The defendants, and each of them, misled plaintiff physicians into believing that medical malpractice insurance was not obtainable in the State of Rhode Island at the maximum rates established by the Insurance Commissioner of the State of Rhode Island, and fraudulently and deceitfully coerced certain of plaintiff physicians into purchasing medical malpractice insurance from said defendants at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island. In furtherance of such fraudulent scheme, defendants require that the plaintiff physicians purchasing said insurance at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island, sign a so-called "waiver form" devised and provided by defendants wherein the purchaser purports to represent to the selling insurance company that the insurance coverage that he desires to purchase is unavailable in the State of Rhode Island at rates at the maximum rate established by the Insurance Commissioner, and the purchaser therefore requests that the insurance company sell him such coverage at rates in excess of the maximum so established.

17. As a direct result thereof, defendants have sold to some of plaintiff physicians medical malpractice insurance at rates in excess of the maximum rates established

Appendix C

by the Insurance Commissioner of the State of Rhode Island, in contravention of the laws of the State of Rhode Island.

18. The defendants, and each of them, have, by coercion, intimidation, fraud, deceit and other actions complained of, supra, forced plaintiff physicians to enter into unconscionable contracts of insurance, in violation of the law and public policy.

19. As a direct result thereof, plaintiff physicians have been forced to expend unjustified and exhorbitant amounts for the purchase of medical malpractice insurance.

20. As a direct result thereof, patients have been, and will in the future be required to pay charges for medical treatment and hospitalization far in excess of the fair and justifiable charges in accordance with the then current market conditions.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

By their Attorney:

/s/ LEONARD DECOF

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